

MARY JO LANZAFAME
ASSISTANT CITY ATTORNEY

THOMAS C. ZELENY
CHIEF DEPUTY CITY ATTORNEY

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

JAN I. GOLDSMITH
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1100
SAN DIEGO, CALIFORNIA 92101
TELEPHONE (619) 533-5800
FAX (619) 533-5856

MEMORANDUM OF LAW

DATE: February 6, 2013

TO: Honorable Mayor and City Council

FROM: City Attorney

SUBJECT: Application of the Living Wage Ordinance to the Proposed Security Contracts
for Qualcomm Stadium

INTRODUCTION

On January 16, 2013, the Budget and Finance Committee forwarded two contracts for security at Qualcomm Stadium to the full City Council without a recommendation. The Budget and Finance Committee also requested that the City Attorney's Office provided a written opinion addressing how the City's Living Wage Ordinance (LWO) applies to the proposed security contracts. This Memorandum of Law answers that question and addresses whether the City can enter into the security contracts without an agreement on how the LWO applies.

QUESTION PRESENTED

Does the LWO require living wages to be paid on the Qualcomm security contracts?

SHORT ANSWER

Yes, the LWO requires living wages be paid on the Qualcomm security contracts.

BACKGROUND

On April 20, 2012, the City issued Request for Proposal No. 10024458-13-V for security services at Qualcomm Stadium (RFP). The RFP indicates the security services are divided into two contracts. One contract is for security for the entire 166-acre Qualcomm Stadium site, to be provided twenty-four hours a day, seven days a week (24/7 Contract). The other contract is to provide security for all events held at Qualcomm Stadium except for events held by the San Diego Chargers (Events Contract). The City issued three addenda to clarify the terms of the RFP on April 20, May 3 and May 14, 2012. The deadline to respond to the RFP was May 17, 2012. Proposals were received from Staff Pro Inc. (Staff Pro), Elite Show Services, Inc. (Elite), and two other qualified firms.

On August 22, 2012, the City announced that Elite won the 24/7 Contract and Staff Pro won the Events Contract. Elite protested the award of the Events Contract to Staff Pro on September 4, 2012. One of the grounds of Elite's protest questioned whether Staff Pro intended on complying with the LWO, referencing a note Staff Pro added to its bid sheet for the Events Contract, where proposed hourly rates for services are bid:

PLEASE NOTE: Unit costs rates are not subject to Living Wage Ordinance due to client exemptions and short-term nature of contracts for events.

By email of September 10, 2012, citing Staff Pro's note on its bid sheet, the City asked Staff Pro to "acknowledge living wage will be paid by your company under this contract." On September 11, 2012, Staff Pro responded by email saying "that Staff Pro will comply with San Diego's living wage ordinance as requested throughout the RFP." The City denied Elite's protest on September 20, 2012. The City explained that Staff Pro's note did not relieve Staff Pro of its obligation to comply with the LWO, and that Staff Pro had signed the City's form certifying compliance with the LWO.

On November 28, 2012, the Qualcomm security contracts were discussed at the Budget and Finance Committee. At the meeting, Elite raised several objections to the award of the Events Contract to Staff Pro, including whether Staff Pro intended to pay living wages. City staff tentatively indicated that the LWO may not require Staff Pro to pay living wages because Staff Pro would not be paid by the City, but by those holding events at Qualcomm. Some of the Councilmembers expressed their belief that living wages must be paid because the services are being provided at Qualcomm Stadium. The Budget and Finance Committee continued the matter to its next meeting.

On December 4, 2012, the City's Living Wage Manager issued a memorandum to the Budget and Finance Committee stating that the LWO applies to the proposed security contracts for Qualcomm Stadium. On January 2, 2013, Staff Pro sent a letter to the members of the Budget and Finance Committee regarding the award of the Qualcomm security contracts. The letter addressed several matters, including the LWO. Staff Pro reiterated its intent to comply with the LWO. Staff Pro also indicated that:

Purchasing Department staff pointed out that the Living Wage Ordinance is not applicable in every conceivable situation that may arise under the work awarded to Staff Pro. Unlike the work Elite was awarded, which will be paid directly by the City for services provided directly to the City, Staff Pro will be providing security to tenant events at the Stadium. The City has acknowledged that some of those events do not trigger the City's Living Wage Ordinance, but where it does, we will fully comply.

By letter dated January 9, 2013, the City again sought written confirmation that Staff Pro would pay living wages for services provided under the Events Contract "to avoid future disagreements." The City proposed adding a provision to the Events Contract that would expressly require payment of living wages. On January 11, 2013, Staff Pro responded through its attorney questioning why the City is changing the bid requirements after bid opening and

proposing to add a contract term that is inconsistent with the LWO and the RFP. Staff Pro explained:

Far from confirming the terms of the LWO, this new provision attempts to extend the scope of the LWO under this contract to situations beyond the scope of the Council adopted LWO and eradicates all the Council approved exemptions contained in the Ordinance.

Staff Pro concluded by reiterating its commitment to comply with the LWO, but indicated it could not agree to a new RFP term that would affect its pricing after its bid was submitted.

ANALYSIS

Staff Pro's correspondence confirms it intends to comply with the LWO, but asserts that the LWO does not require Staff Pro to pay living wages under the Events Contract. Staff Pro explains that because it will be entering into short term contracts with those who hold events at Qualcomm, and not with the City, its services are exempt from paying living wages.¹

The City adopted the LWO in 2005. San Diego Ordinance No. O-19386 (Jun. 6, 2005). The purpose of the LWO is to ensure that workers providing services to the City and the public earn a wage sufficient to keep them and their families out of poverty. San Diego Municipal Code § 22.4201. Paying a living wage is also intended to improve the quality of services provided to the City and the public. *Id.* The LWO applies to service contracts, financial assistance agreements (not relevant here), and City facility agreements. SDMC § 22.4210(a). The LWO specifically defines each of these types of contracts. SDMC § 22.4205.

I. THE QUALCOMM SECURITY CONTRACTS ARE NOT CITY FACILITY AGREEMENTS UNDER THE LWO.

The LWO applies to City facility agreements. SDMC § 22.4210(a)(4). A City facility agreement is defined in the LWO as:

[A]n agreement between the *City* and a *business* for the lease, use, or management of a *City facility* that generates \$350,000 or more in annual gross receipts to the *business*. *City facility agreement* includes (a) subleases or other agreements for use of the *City facility* for 30 days or more in any calendar year; and (b) subcontracts and concession agreements for *services* at the *City facility* with a combined annual value of payments in excess of \$25,000 for any single subcontractor or concessionaire, and with a term of more than 90 days.

SDMC § 22.4205.

¹ Generally, what Staff Pro describes is similar to how security is provided at other City facilities like the Convention Center and the Sports Arena, where security companies contract only with the managers of those facilities or individual event promoters. The City does not contract for security for events at those facilities. Security at Qualcomm Stadium is different, however, because the City has advertised and intends to award two contracts for security services.

Subsection (b) identifies certain subcontracts for services provided to the public at City facilities as requiring payment of living wages. Qualcomm Stadium is a City facility under the LWO. SDMC § 22.4205. Services provided under subsection (b) differ from the requirements for a “service contract” (discussed below) in that the service provider does not have to have a contract with the City, the services must be provided at a designated City facility, and the term of the contract must be longer than 90 days.

Based on the definition of a City facility agreement, Staff Pro argues it does not have to pay living wages for those subcontracts that have less than a 90 day term. The “short term nature of contracts for events” noted by Staff Pro in its bid would exempt most, if not all, the security services from living wages. A subcontract between Staff Pro and a business holding an event would have to be for a term longer than 90 days to trigger payment of living wages.

The Events Contract requires Staff Pro to enter into separate security contracts with those who hold events at Qualcomm Stadium. Those separate contracts that have less than a 90-day term are not considered City facility agreements under the LWO. Staff Pro’s employees working on those contracts would not have to be paid living wages, but for the Events Contract. The Events Contract is a service contract between the City and Staff Pro, a separate trigger under the LWO that requires payment of living wages.

II. THE QUALCOMM SECURITY CONTRACTS ARE SERVICE CONTRACTS THAT ARE NOT EXEMPT FROM PAYING LIVING WAGES.

The proposed 24/7 Contract with Elite is a service contract under the LWO that requires payment of living wages. The 24/7 Contract is between the City and Elite for security services, a “service” expressly identified as being covered by the LWO. The City estimates it will pay Elite about \$351,000 to provide security for the first year of the contract, which exceeds the minimum \$25,000 annual value required to be a “service contract” under the LWO. Elite has indicated it will pay living wages under the 24/7 Contract.

“Services” are defined in the LWO by a list of employment activities that specifically includes security services. SDMC § 22.4205. The LWO defines a “service contract” as:

[A] contract between the *City* and a *business* with a combined annual value of payments in excess of \$25,000, and any applicable subcontracts or franchises,² to furnish *services*. For the purpose of this division, *service contract* includes all contracts for *services* provided through the managed competition program under Charter section 117(c).”

SDMC § 22.4205.

² We note that the definition of a service contract includes “franchises,” which is not defined in the LWO. The Events Contract has some indicia of a franchise, in that it grants a private company the exclusive right to provide services on City property and to charge others for those services. However, the relatively short term of the Events Contract (3 years plus two 1-year options) make it unlikely that the Events Contract is a franchise under the City Charter. *See Saathoff v. City of San Diego*, 35 Cal. App. 4th 697 (1995).

The LWO was amended in 2008 to require the definition of a service contract to be liberally interpreted in order to further the policy objectives of the LWO. SDMC § 22.4215(c). The purpose of this amendment was to create “a presumption against the determination of exempt status” if the applicability of the LWO is in question. IBA Report No. 08-110 (Oct. 20, 2008). Service contracts cannot be subdivided into smaller contracts to avoid paying living wages. SDMC § 22.4210(b).

There are several exemptions for certain types of service contracts,³ but none of the correspondence from Staff Pro, Elite, or the City claims any of these exemptions apply to either security contract. The exemptions referenced by Staff Pro relate to City facility agreements, which were addressed above.

The 24/7 Contract and the Events Contract are very similar except in one respect. The City will pay Elite directly for services provided under the 24/7 Contract. Under the Events Contract, Staff Pro will be paid by event promoters, not by the City. Other than that, both contracts similarly describe how long the companies have the right and obligation to provide security, the manner in which security is to be provided, and the hourly rates the companies may charge for their services.

City staff estimates that Staff Pro will be paid roughly \$900,000 annually if it is awarded the Events Contract, based on the hourly rates in Staff Pro’s bid. That annual amount could vary substantially with the number of events and the attendance at Qualcomm Stadium. However, the “combined annual value of payments” will certainly exceed the threshold of \$25,000 necessary to be considered a “service contract” under the LWO. According to City staff, the City does not anticipate holding any events at Qualcomm Stadium, so the payments Staff Pro would receive through the Events Contract will likely come entirely from event promoters. The definition of “service contract” does not state that \$25,000 in payments must be made by the City, so the question is whether such a requirement should be implied. We turn to the rules of statutory interpretation to answer that question.

³ The exemptions for service contracts are:

- (1) contracts subject to federal or state law or regulations that preclude the applicability of this division’s requirements;
- (2) contracts that involve programs where the City shares management authority with other jurisdictions, unless all the signatory jurisdictions agree to the applicability of this division’s requirements to the contract;
- (3) contracts for services by any other governmental agency;
- (4) contracts for public works construction;
- (5) cooperative procurement contracts, including contracts that use a bidding process that substantially complies with City requirements;
- (6) contracts for the purchase of goods, property, or the leasing of property;
- (7) contracts for professional services, as described in California Labor Code Section 515(a), such as design, engineering, financial, technical, legal, banking, medical, management, operating, advertising, or other services.
- (8) contracts where compliance with this division is not in the best interests of the City as certified by the City Manager and approved by the City Council.

The rules of statutory construction and interpretation apply to local ordinances. *County of Madera v. Superior Court*, 39 Cal. App. 3d 665, 668 (1974). “[T]he objective of statutory interpretation is to ascertain and effectuate legislative intent.” *Burden v. Snowden*, 2 Cal. 4th 556, 562 (1992). In determining intent, we first look to the language of the statute, giving words used their usual meaning. *Hamilton v. State Board of Education*, 117 Cal. App. 3d 132, 141 (1981); *California Teacher’s Assn v. San Diego Community College Dist.*, 28 Cal. 3d 692, 698 (1981). If a statute is ambiguous, it must be interpreted so as to effectuate its purpose, that is, the object to be achieved and the evil to be prevented. *People v. Cruz*, 13 Cal. 4th 764, 774-75 (1996); *Richfield Oil Corp. v. Crawford*, 39 Cal. 2d 729, 738 (1952).

The literal reading of the phrase “a contract between the City and a business with a combined annual value of payments in excess of \$25,000” does not restrict payments to any particular source. The language anticipates the payments arising from a contract with the City, but does not say the payments must be made by the City. The Events Contract will give Staff Pro the exclusive right to provide security, and with it the exclusive right to payment from those who hold events at Qualcomm Stadium. All payments arise from a contract with the City, therefore they may be counted towards the \$25,000 threshold.

Even assuming the definition of “service contract” is ambiguous, applying the rules of statutory interpretation leads to the same conclusion. In determining the intent of the legislature, we can look to other provisions of the statutory scheme for guidance. *See People v. Drake*, 19 Cal. 3d 749, 755 (1977), superseded by statute on other grounds. “Where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed.” *Allis-Chalmers Corp. v. City of Oxnard*, 126 Cal. App. 3d 814, 821 (1981) (quoting *Richfield Oil Corp.*, 39 Cal. 2d at 735).

In the same Article of the Municipal Code as the LWO, the City Council has demonstrated that when it intends for only City funds to be counted, it knows how to say so. For example, contracts for goods and services are awarded “based on the estimated amount of City funds to be paid to the winning *bidder* under the contract.” SDMC § 22.3203. Similarly, the approval required to award public works contracts is tied to the amount of the “expenditure” under the contract. SDMC § 22.3102(a). The use of the phrase “combined annual value of payments” implies a different, broader intention of the City Council to include all sources of payments, not just payments from the City, in determining the value of the contract. This interpretation is consistent with the express requirement in the LWO to interpret the definition of a service contract liberally in favor of paying living wages and against exemptions.

Interpreting the LWO to require paying living wages under the 24/7 Contract but not the Events Contract would also lead to an anomalous result, which the rules of statutory interpretation say must be avoided.

When uncertainty arises in a question of statutory interpretation, consideration must be given to the consequences that will flow from a particular interpretation. In this regard, it is presumed the Legislature

intended reasonable results consistent with its expressed purpose, not absurd consequences. Where the language of a statutory provision is susceptible of two constructions, one of which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted.

Don Johnson Productions, Inc. v. Rysher Entertainment, 209 Cal. App. 4th 919, 935 (2012) (quoting *Harris v. Capital Growth Investors XIV*, 52 Cal. 3d 1142, 1165-66 (1991), superseded by statute on other grounds).

If the Events Contract is not a service contract under the LWO, security guards outside Qualcomm Stadium would be paid living wages while security guards inside Qualcomm Stadium would not, even during the same event. Given the purpose of the LWO to pay living wages to working families, it is unlikely the City Council intended such consequences when both security companies are under contract with the City.

By letter dated January 21, 2013, Staff Pro seems to suggest that there cannot be a service contract under the LWO because there will not be a contract between the City and Staff Pro. Staff Pro quotes from a portion of a sentence in the RFP that states “[t]he City of San Diego will not enter into a contract with the selected contractor.” The entire sentence from the RFP, and the sentence that follows says:

The City of San Diego will not enter into a contract with the selected Contractor to provide Event Security Services for events not sponsored by the City. The selected Contractor will enter into contracts with the event promoter/tenants and the City for Event Services at rates that do not exceed the hourly rates bid by the Proposer.

RFP section C, subsection E.

According to City staff, the intent of these two sentences is to indicate to the bidders that the City will not be entering into separate security contracts for each event. The winning bidder is supposed to enter into separate contracts with event promoters to receive payment at the hourly rates bid. These sentences are not meant to say there will not be a contract between the City and the winning bidder. That would not make any sense. Without a contract between the City and the winning bidder, the City would not have any means to ensure that the winning bidder provides security according to the terms and requirements in the RFP. Without a contract, the winning bidder would not have any means to enforce its exclusive right to provide security services at Qualcomm Stadium for the next three years. The RFP includes a “Contract Form” and a signature page for the contractor, the City, and the City Attorney’s Office to sign. RFP section A. A contract is clearly contemplated and required.

CONCLUSION

The LWO requires payment of living wages on both the 24/7 Contract and the Events Contract. While many of the future contracts between Staff Pro and those holding events at Qualcomm Stadium may be too short to be a City facility agreement, the Events Contract meets the definition of a service contract under the LWO which independently requires payment of living wages.

JAN I. GOLDSMITH, City Attorney

By */s/ Thomas C. Zeleny*

Thomas C. Zeleny
Chief Deputy City Attorney

TCZ:mb

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cc: Andrea Tevlin, IBA

Karan Wolff, Acting Purchasing Agent

Mike McSweeney, Qualcomm Stadium Manager

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